U.S. Department of Labor

Office of Administrative Law Judges
2 Executive Campus, Suite 450
Cherry Hill, NJ 08002

(856) 486-3800
(856) 486-3806 (FAX)

Issue Date: 27 June 2007

CASE NO.: 2006-LHC-01579

OWCP NO.: 02-113700

In the Matter of:

R.M.
Claimant,

v.

TRANS OCEAN MARITIME SERVICE,
c/o ESIS,
Employer,

and

INSURANCE COMPANY OF NORTH AMERICA,
c/o CIGNA WCC,
Carrier.

Appearances: David Gosnay, Esq.,
For Claimant

Stephen J. Harlen, Esq.,
For Employer/Carrier

Before: Janice K. Bullard
Administrative Law Judge

DECISION AND ORDER

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 et. Seq. (the "Act"), and the regulations promulgated thereunder. The claim was brought by Claimant against Trans Ocean Maritime Services, ("Employer", hereinafter).

A hearing was held before me in Cherry Hill, New Jersey, on November 28, 2006. The parties appeared and presented evidence and testimony. Claimant submitted written closing

argument on February 21, 2007 and Employer/Carrier submitted written closing argument on February 27, 2007.[1]

I. BACKGROUND

On March 30, 1994, Claimant sustained an injury involving his left knee and foot while at work. Benefits were paid to him under the Act pursuant to his claim. On September 3, 2002, Employer controverted the claim, maintaining that Claimant had reached maximum medical improvement. The parties have agreed that Claimant is permanently disabled under the Act. (Tr. at 7).

II. ISSUES

1. The date of Claimant's maximum medical improvement is in dispute; and

2. The extent of Claimant's disability is in dispute.

III. POSITION OF THE PARTIES

Claimant maintains that he is totally disabled and has been since the date of his injury. He further maintains that his past payment of disability should not have been reduced to partial disability at any time. He has not experienced medical improvement and cannot engage in any kind of employment.

Employer contends that Claimant's injuries have resulted in permanent partial disability due to scheduled loss. Employer maintains that Claimant experienced medical improvement, and retains the ability to perform suitable alternative employment.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Summary of the Evidence

A. Stipulations

The parties entered into the following stipulations, which I adopt as findings herein:

1. The parties are subject to the Act.

2. An employer-employee relationship between Employer and Claimant existed at the time of the injury.

3. Claimant sustained an injury while at work on or about March 30, 1994 in Gloucester City, New Jersey.

[1] In this Decision and Order, Claimant's evidence is designated as "CX-#" and Employer's Evidence is designated as "EX-#". Some other exhibits that I have admitted to the record *sua sponte* are identified as "ALJ -#". References to the hearing transcript are designated as "Tr. at (page) #"

4. Claimant subsequently sustained an injury while at work.

5. Employer was timely notified of the injury.

6. The claim for benefits was timely filed.

7. An informal conference was held on January 12, 2006.

8. The average weekly wage at the time of injury was $732.80.

9. Payments for medical treatment were made under Section 7 of the Act.

10. Payments for disability under the Act were made as follows:

    a) Temporary total disability was paid for 140.857 weeks at $488.52 per week for the period from 3/30/94 to 12/09/96 for a total of $68,811.46;
    (b) Temporary partial disability was paid for 137 weeks at $314.67 per week from 12/10/96 to 7/26/99 for a total of $43,109.79;
    (c) Temporary total disability was paid for 151.857 weeks at $488.52 per week from 7/27/99 to 6/23/02;
    (d) permanent partial disability has been paid at a scheduled amount from 6/24/02 for 43.20 weeks at $488.52 per week for a total of $21, 104.06.

ALJX-1.

B. Claimant's Testimony

Claimant graduated from high school in 1976, having taken courses in shop work. Tr. at 24. His only post-high school education involved some classes he took in the 1980's at St. Joseph's College to prepare to apply for a job as his union's business agent. Tr. at 25; 34. The course was taught by business agents, and involved union related matters. Tr. at 34-35. Claimant also has a commercial driver's license. Tr. at 37.

Claimant has worked as a truck driver, and his first job after high school was as a laborer on a thoroughbred farm. Id. He also did some construction work, and most of his work involved driving a truck, which qualified him to join the Teamster Union, Local 676. Tr. at 25-26. In the mid-1980's, Claimant changed his work from truck driving to working on heavy construction, where he helped redeck bridges and repaving the turnpike. Tr. at 28-29. His job involved hauling heavy equipment, such as bulldozers, backhoes, tractors, and lowboys to the job site, and running the low boy. Tr. at 29-30. He worked on many different jobs until he started to work for Trans Ocean in 1994. Tr. at 30. Trans Ocean hired him to haul containers between locations and from ships, and onto and from trailers. Tr. at 39. Claimant was able to perform the work, and did not consider it as heavy as some of the jobs he had performed. Tr. at 39-40. He was assigned jobs on a daily basis at Trans Ocean, because he was not a permanent employee. Tr. at 40.

In 1977, Claimant was injured in a motorcycle accident, and could not work for a year and 1/2 because of injuries to his femur, his skull and his ribs. Tr. at 31. He returned to his usual work in heavy labor when he recovered without limitations, although he was told by one doctor that his broken leg was shorter than his other leg. Tr. at 32. In the mid-1990's Claimant was in an automobile accident and injured his left hand, elbow and shoulder. Tr. at 56. He was treated for his injuries and recovered pretty well, but has some limitations in reaching behind his back. Tr. at 57. He had never been prevented from performing job duties because of those limitations. Id. In 1999 or 2000, Claimant was involved in another automobile accident and hurt his right hand, elbow and shoulder, and was treated, with the same limitations as he experienced with his left upper extremities. Tr. at 58. He had no weight lifting restrictions due to those accidents and could lift overhead. Id.

Claimant worked for two months as a business agent when he graduated from the course he took at St. Joseph's, and recalled going to grievances involving disputes between workers and employers. Tr. at 35-36. Claimant did not feel confident to perform that position, and had problems reading and writing and doing the work involved. Tr. at 37. He would have liked to have been able to do the job, as it paid more money. Tr. at 36.

On the day of the injury at issue herein, Claimant was a "checker", which involved keeping an account of items that came in to the facility. Tr. at 40-41. Claimant testified that he was inside the warehouse, facing the door, when a forklift came from behind him and struck him as he turned around. Tr. at 41. His left foot was run over by the front tire, and he was pulled under the machine, which ran over his foot and up his calf to his left knee. Id. Claimant was transported by ambulance to Cooper Hospital where he was treated by an orthopedic doctor. Tr. at 42. Claimant could not bear weight on his left leg, or twist or turn. Tr. at 43-44. Claimant was able to climb stairs with the help of a railing. Tr. at 44. He returned to work as a truck driver for a few weeks, but the pain and swelling in his knee increased, and he could not climb and jump up and down from the cab as he needed. Tr. at 45. Claimant continued to experience problems walking, kneeling, squatting, climbing, turning, and consulted Dr. Kelly, who performed surgery on his knee and foot. Tr. at 46-48. Claimant's problems persisted despite his surgery, and he underwent several other procedures. Tr. at 48-49. One of the procedures involved an attempt to straighten his left foot, but Claimant continues to feel unusual sensation in his foot. Tr. at 49.

In January, 1998, Claimant fell while attempting to enter his home, and broke the heel in his right foot. Tr. at 50. Claimant required surgery to relocate the heel with a pin and with fusion. Id. He experienced difficulty healing, as he contracted an infection that required intravenous medication that he was required to take four times a day for approximately a month. Tr. at 53. Dr. Peterson took care of his infection. Id. He has less flexibility in his right foot, which affects his ability to walk on anything other than a flat surface. Tr. at 54. In addition, in bad weather, his foot swells, and he needs to sit. Id. Claimant stated that his left knee continues to swell when he walks or stands. Tr. at 52. Claimant is unable to climb ladders or squat because of his left knee. Tr. at 56. His left foot remains unchanged, and continues to give him the sensation that he is "standing on a stone or a rock". Tr. at 52.

Claimant described his daily activities as including making sure his son gets to school, visiting people, and cleaning his house, which he described as a "two-story bungalow" (Tr. at 38). Tr. at 64. Claimant mows his lawn with a riding mower and says he "plays around" with his motorcycle, "as long as [he's] not kneeling or squatting or anything like that". Tr. at 64. Claimant drives, but usually stops after about one half hour because his legs start to bother him. Tr. at 65. Claimant cannot operate a manual transmission because he can't push on the clutch with his left leg. Tr. at 66. His bedroom is on the main floor, and he is able to get up and down the stairs into his house by holding onto the railing. Tr. at 66.

Claimant testified that he never worked as a cashier, does not own a computer, does not know how to type, and has never used any kind of portable computing device. Tr. at 67. Claimant would love to return to work but cannot because of his injuries. Id. If he could, he would return to driving a truck, but he cannot push on the clutch, he cannot jump in and out of the cab, and he cannot jump out of the back of a trailer onto the ground. Tr. at 68. Claimant has not applied for any work because of his injuries. Tr. at 68.

C. Treatment Records

Cooper Hospital (CX 5)

Claimant's emergency room treatment on March 31, 1994 documents his injury to his left foot and knee.

Charles Wilkins, M.D. (CX 6)

Claimant's left knee effusion with no stability and tenderness is noted, as well as diffuse swelling of his left foot and fracture at the base of the foot. Mild derangement of the right knee was also observed. On November 23, 1994, Claimant underwent diagnostic arthroscopy of the left knee, with debridement of femoral condyle.

X-ray of 4/13/1995 (CX 7)

Impression was of mild narrowing of the medial compartment of the left knee consistent with early osteoarthritis.

John Kelly, M.D. (CX 8)

Dr. Kelly's treatment of Claimant is documented in notes dating from April 13, 1994 through February 24, 2000. Claimant's torn ACL tear and grade I MCL were noted, and on July 3, 1995, he underwent arthroscopy for the tear and posterior medial eruption. On December 18, 1995, Claimant underwent surgery for "cock-up deformity left fifth toe" through arthroplasty of the metatarsophalangeal joint. On January 19, 1998, Claimant's right heel fracture was noted, and CT scan was prescribed. On February 5, 1998, Dr. Kelly prescribed non-surgical treatment, and noted that Claimant's left knee retained anterior instability and valgus instability and mild effusion. On June 4, 1998, Dr. Kelly observed that Claimant's heel was not healing, noting his diabetic

condition as a potential complication in the healing process. On December 21, 1998, Dr. Kelly documented that an MRI showed a horizontal cleavage tear and posterior horn medial meniscus with minimum effusion of the left knee, consistent with meniscus pathology. Arthroscopic procedure was recommended and performed on January 22, 1999.

On March 11, 1999, Dr. Kelly wrote:

> [Claimant] sustained a calcaneous fracture of the right foot which relates to me was the effect of his losing his balance with his left knee. He was found to have a microscopic lesion of the left knee which could explain a mechanical click and giving away. This was related to his work injury, so I believe that based on the patient's testimony, that a right foot injury was a secondary result of his left knee instability since he says he did have a knee giving away at the time of his injury.

On July 27, 1999, Claimant underwent a fusion and ostectomy to repair his right heel. On December 15, 1999, Dr. Kelly observed that Claimant's heel required investigation for infection. The screw in his heel was removed in February 24, 2000, and he continued to wear a boot.

X-ray of 3/5/1998 (CX 10)

Impression of right calcaneus (heel) was of fraction of the mid to anterior portions consistent with a crush injury, with soft tissue swelling and osteoporosis.

Virtua West Jersey Hospital (CX 11; 13)

Claimant's hospitalization from November 26, 1999 until December 6, 1999 was for treatment of his infected right foot and cellulitis of the ankle, with osteomyelitis.

Claimant was again hospitalized in April, 2000 for swelling of the right leg, with unclear etiology. Deep vein thrombosis was ruled out, and reflex sympathetic dystrophy versus adult osteomyelitis was considered as diagnosis. Close follow up was advised, due to his history.

John W. Peterson, M.D. (CX 12)

Dr. Peterson is a specialist in infectious diseases who treated Claimant's infected heel. He authored a report dated December 16, 1999, which documented Claimant's treatment and the development of cellulitis over his right ankle and foot. The doctor recommended a four to six week course of treatment with intravenous antibiotics, with need for close follow up because of the risk of potential amputation.

D. Medical Opinions

Barry S. Gleimer, D.O. (CX 14)

In a report dated July 26, 1996, Dr. Gleimer summarized the results of his examination of Claimant, who reported "complaints of left knee and left foot pain." The doctor documented Claimant's accident and course of medical treatment and surgeries by Dr. Wilkins and Dr. Atella, as well as physical therapy. Dr. Gleimer's physical examination revealed "good stability about the left knee to varus, galgus and AP stress". Claimant's subjective reports of medial joint line pain and tenderness with "give way" upon plantar rotation was noted, but "on exam, there appears to be good stability to the posterior medial corner as well as anterior and posterior cruciate ligaments and collaterals. The patient has no effusion about the left knee." The doctor observed that Claimant's left fifth toe was mildly elevated above ground level, and some arthrofibrosis was evidence with limited plantar flexion, but no effusion of that joint was noted. There was no evidence of chronic irritation or compression. The doctor diagnosed "1. Status post ligament reconstruction and stabilization left knee. 2. Status post excision left foot with secondary arthrofibrosis and no contracture with metatarsalgia."

Dr. Gleimer wrote that he did not have sufficient history from the initial injury and treatment to determine whether Claimant's injuries were due to his work trauma. The doctor concluded that he had regained "satisfactory motion, but had some medial joint line discomfort on acute flexion past 140º of flexion suggestive of ongoing meniscal pathology. Dr. Gleimer found that "it would certainly not be unreasonable even at this point in time to attempt to obtain and [sic] MRI even around metal fixation devices to hopefully visualize the menisci to rule out additional pathology". The doctor found no evidence of chronic irritation of the left foot, but noted that Claimant used an orthotic with some relief to his discomfort.

Dr. Gleimer concluded that Claimant could perform sedentary activities and some light duty. However, the doctor further found that:

> [Claimant] does, however, have difficulty potentially with prolonged maintenance of flexed knee position as well as prolonged standing and/or walking and these would reasonably result in discomfort to this knee due to either the stress of activity and/or the general ache and stiffness which will occur following prolong immobilization/immobility (i.e. sitting). As a result, it is my opinion the patient is not totally disabled, but cannot return to heavy work, construction or as a longshoreman. I believe his work capacity will form a sedentary to light duty level, but a work capacity evaluation would be necessary to determine where. Whatever activity or job he performs would certainly require his ability to periodically sit, stand, walk, or change positions needed for comfort. He certainly cannot sit, stand, or walk continuously for an eight hour day.

Gregory Maslow, M.D. (CX 1; CX 1a; CX 1 b; CX 1c)

Dr. Maslow is a Board-certified orthopedic surgeon (CX 1b) who examined Claimant on October 25, 2005, and reported the results of his examination and review of the medical evidence

in a report of November 1, 2005. CX 1b. The physician documented Claimant's summary of his injury and treatment, as well as his reports of subjective symptoms and pain. Claimant's history of diabetes and other accidents and traumas was also noted. Claimant's examination revealed antalgic gait on the left with a shuffle, and inability to stand comfortably on heels. Claimant could not squat, and had discomfort on left knee. He had full range of motion of the cervical spine, and shoulders. His right knee showed mild patellofemoral crepitus but full range of motion, full stability and no evidence of meniscal abnormality. The left knee showed scars, with full extension, but lack of 5º of flexion. No medial or lateral instability was evident, and no effusion, but mild synovitis without warmth was shown. No meniscal sign was shown. Left ankle showed full range of motion in dorsiflexion and plantar flexion, full stability, and no effusion or synovitis. The left heel was non-tender, and the forefoot and mid foot showed "considerable tenderness over the fifth metatarsal region". The left knee "showed considerable crepitus on examination". On the right side, the ankle was full in dorsiflexion and plantar flexion, but lacked 20% subtalar motion inversion and eversion, with scarring over the heel and subtalar crepitus There was also tenderness at the subtalar joints and over the heel. 3 centimeters of atrophy of the left leg compared to the right was shown.

Dr. Maslow's impression was that Claimant suffered a crush injury to the foot with subsequent fifth metatarsal phalangeal joint deformity and sprain of the left knee with internal derangement and meniscal tear. In addition, Claimant suffered a comminuted fracture of the right calcaneus that required subtalar fusion. The doctor concluded that Claimant has "definite and obvious evidence of disability at the left lower extremity and at the right lower extremity as a result of the injuries which were incurred on 3/30/94." Dr. Maslow did not feel that additional surgical intervention would assist his right foot, and that he had permanent disability and impairment of activity due to the right foot injury, which prevented him from working in a job involving "long periods of standing, or walking, and certainly not a job that involved climbing or quick movement on the right lower extremity". CX 1a.

Dr. Maslow also concluded that additional treatment was not needed for Claimant's left foot, but found that he had a permanent disability that has left him with an abnormal gait in that foot which would prevent him from performing long periods of standing or walking, and would not allow him to run or climb. CX 1a. Dr. Maslow believed that Claimant's "most serious injury appears to have been at the left knee", noting that Dr. Kelly performed two surgical procedures and found chondral damage. Dr. Maslow observed that crepitus and synovitis are present, which demonstrate the potential for additional degenerative changes and the need for "joint replacement surgery".

Dr. Maslow rated Claimant's impairment using the A.M.A. Guides to the Evaluation of Permanent Impairment, Fifth Edition:

1) At the left knee 45% whole person impairment based on the combined values for gait abnormality, atrophy, loss of motion, ligamentous injury and instability and documented arthritis.
2) A 1% whole person impairment based on the injury to the fifth metatarsal phalangeal joint.

3) 15% whole person impairment based on the calcaneal fracture and required arthrodesis with resultant gait abnormality.

The doctor found a 53% whole person impairment. CX 1a.

In a letter dated February 17, 2006, Dr. Maslow rated Claimant's impairment as follows:

1) A 3% left lower extremity impairment as a result of the metatarsal phalangeal joint injury.
2) a 75% impairment of the left lower extremity as the result of the knee impairment with gait abnormality, atrophy, loss of motion, ligamentous injury, and instability and documented arthritis factored in.
3) A 38% lower extremity impairment based on the calcaneal fracture on the right side with the required arthrodesis and resultant gait abnormality. CX 1c.

Dr. Maslow testified by deposition on November 15, 2006, and stated that he evaluates approximately 10 patients per week in order to give a medical opinion in cases involved in litigation. CX 1 at 6. The doctor estimated that 70% of his work of that nature is done for the defense. Id. The doctor's practice involves general orthopedic surgery, with an emphasis on knee surgery, both joint replacement and arthroscopic. CX 1 at 7. Dr. Maslow also performs low back surgery, hip replacement surgery, carpal tunnel and tennis elbow surgery. Id. The doctor described his examination of Clamant and noted his complaints of pain in the left knee and right foot. CX 1 at 9-10. In addition, Claimant's insulin dependent diabetes and history of vehicular accidents were noted. CX 1 at 10. Dr. Maslow summarized the findings of his examination as documented in his written report. CX 1 at 11-14. The doctor summarized his review of Claimant's medical history and the medical records, including those relating to Claimant's motor vehicle accident in 2001. CX 1 at 15.

Dr. Maslow observed that in the 1994 injury on the job, Claimant suffered a crush injury to the left foot with deformity to the fifth joint and a sprain of the left knee with internal derangement and meniscal tearing. CX 1 at 16. Dr. Maslow attributed Claimant's subsequent comminuted fracture of the right calcaneous that required a subtalar fusion to the injury to Claimant's left knee. Id. The doctor described Claimant's right foot as abnormal, with restricted motion as the result of trying to resolve pain from the fracture. CX 1 at 17. Claimant has an "awkward gait", and tenderness of the foot and the heel. CX 1 at 17-18. He cannot squat partially because of his heel and because of his knee. CX 1 at 17. Dr. Maslow concluded that Claimant's "left knee is a major problem. He has pain, he has restricted motion, he has major crepitus. He had a number of surgical procedures. He has a mild synovitis at the left knee, which is a mild continuing inflammation. He has a very significant gait abnormality. He cannot squat because of the left knee and complains of a great deal of pain on attempted squatting. And he's unable to stand comfortably on the left leg. He's unable to walk comfortably and actually has a shuffle gait because of pain primarily at the left knee, but also the left foot and right foot." CX 1 at 17-19. Dr. Maslow is of the opinion that Claimant's knee will require additional surgery in the future. Id.

Dr. Maslow opined that at the left lower extremity, there was "three percent impairment as a result of injury to the fifth metatarsal phalangeal joint in the forefoot on the left side." CX 1 at 19. Dr. Maslow assessed an impairment of 38% at the right lower extremity based on the comminuted calcaneal fracture, with subsequent requirement for subtalar arthrodesis with resultant loss of motion". CX 1 at 20. The doctor observed that Claimant also experienced continued pain, crepitus and gait abnormality, which he factored into his impairment rating. Id. In addition, Dr. Maslow calculated a 75% impairment of the left leg due to the Claimant's knee impairment, which causes gait abnormality, "significant" atrophy, loss of motion, instability, crepitus, pain, swelling and articular surface damage. CX 1 at 20. The doctor considered these to be permanent.

Dr. Maslow addressed different impairment ratings that he had calculated in November, 2005. CX 1 at 21. At that time, he found 1% at the left foot, 15% at the right foot, and 45% at the left knee. Id. Upon reviewing Dr. Didizian's reports, Dr. Maslow concluded that he had underestimated his disability rating, because he had not fully considered the Claimant's restricted range of motion. CX 1 at 21-23. Dr. Maslow observed that Dr. Lee's rating did not consider Claimant's left foot, and therefore, the doctor did not believe that it fully addressed Claimant's combined impairments. CX 1 at 23-14. Dr. Maslow opined that Claimant would not be able to return to work as a longshoreman or do any kind of heavy labor. The doctor stated that he could not engage in work that required him to be on his feet for significant periods of time, or required him to climb, squat, crawl, or lift more than 25 pounds. CX 1 at 25. The doctor did not believe that Claimant could drive a stick shift because of pain in his left leg. CX 1 at 27.

Dr. Maslow did not believe that Claimant's feet would improve, or that his knee would improve, but hypothesized that Claimant might find more function and pain relief with knee replacement. CX 1 at 25-26. Dr. Maslow emphasized that he would continue to have significant limitations despite replacement of his knee. CX 1 at 31. Upon cross examination, Dr. Maslow explained that the impairment rating of the lower extremity that he gave in his report of February 17, 2006 related to the Claimant's leg. CX 1 at 32. The doctor agreed that an individual's rating could be based on an impairment of a foot, rather than the lower extremity under the AMA rating protocol. CX 1 at 33. Dr. Maslow denied that Claimant's abnormal gait was related to a having a shortened leg. CX 1 at 34.

Bong S. Lee, M.D. (EX 1; EX 1a; EX 1b)

Dr. Lee examined Claimant on May 4, 2006 at the request of the U.S. Department of Labor (DOL), and summarized the results of his evaluation in a report of that date. EX 1b. Claimant's medical history, including his motor vehicle accidents was summarized. The physician documented Claimant's injury on March 30, 1994, and his injury in 1997, and his treatment. The doctor noted Claimant's reported complaints of pain and stiffness in the left knee and constant pain in the right foot. Dr. Lee observed that Claimant's right femur is 1 ¼" shorter than his left, and his entire right leg is 1 ½" shorter than the left. His right thigh measured ½" smaller than the left.

The left knee revealed multiple surgical scars and a skin abrasion with the aspect of the condyle. The left knee had 30º genus varus deformity and very limited motion from 0º-90º

compared with 0º-120º on the right knee. Claimant demonstrated pain with extreme flexion of the left knee, and local tenderness over the joint line was observed. No instability of the collateral and cruciate ligaments was evidenced. Palpation of the patella produced pain and crepitus was heard. The legs were symmetrical with no angular deformity and no calf tenderness or swelling was observed.

The left foot revealed multiple surgical scars over the 5th metatarsal as well as the hind foot, and the 5th metatarsal was shorter on the left. There is no motion of the subtalar joint of the left foot. Ankle joints revealed 10º less flexion and extension on the left compared to the right and moderate tenderness was evident on palpation.

Dr. Lee calculated a "partial permanent anatomical impairment of the right foot and left knee as a result of the incident of March 30, 1994. This anatomical impairment has been tabulated on the basis of the AMA Guide to Evaluation of Permanent Impairment, Fifth Edition as follows: 10% impairment rate for the left knee, 7% for the abnormal gait, and 10% for the right ankle. The total impairment of the body would be 27%." EX 1b.

Dr. Lee testified by deposition on August 30, 2006. Dr. Lee is a board-certified orthopedic surgeon (EX 1a) who maintains an active orthopedic practice, seeing approximately 100 patients and performing surgery two days a week. EX 1 at 5-6. Of the 100 patients that Dr. Lee sees, 10 involve independent medical examinations, mostly for the DOL. EX 1 at 6. Dr. Lee summarized the results of his examination of the Claimant on May 4, 2006, and noted the difference in length between Claimant's legs, describing it as "significant". EX 1 at 11. Dr. Lee summarized the medical records he reviewed, which included Claimant's knee surgeries, and X-ray reports, as well as opinions of other consultative physicians. EX 1 at 14-15.

Dr. Lee reviewed his calculation of impairment, and explained that the 7% for abnormal gait could have been somewhat affected by the discrepancy between the length of his legs. EX 1 at 17. But the doctor "considered his left knee, the injury, and also right ankle and foot injury attribute to some degree of the gait abnormalities. So if I break down individually, I contribute 3.5 percent for the left knee, and 3.5 percent for the right ankle and the foot." EX 1 at 17-18. The doctor agreed that it would work out to 13.5% for the left knee and 13.5% for the right ankle, if based on each joint. EX 1 at 18. Dr. Maslow did not consider Claimant's fifth toe a significant factor for permanent impairment, and observed that although it is slightly shorter than his left fifth toe, it has no functional impairment. EX 1 at 19.

Dr. Lee concluded that Claimant had reached maximum medical improvement long before his evaluation, and observed that the most recent treatment was for an injury in 1997. EX 1 at 18-19. Dr. Lee opined that Claimant was unable to return to work as a longshoreman, but would be able to do sedentary or light work. EX 1 at 20. The doctor concluded that Claimant would have restrictions on walking, standing, climbing, kneeling, crouching and heavy lifting. Id. He could drive, and could work full time. Dr. Lee acknowledged that he had approved jobs that vocational expert Castro had referred as potential positions that Claimant could perform. EX 1 at 21.

Upon cross-examination, Dr. Lee agreed that nothing in the medical records suggested that Claimant had a gait problem that affected his ability to perform work before his accident in 1994. EX 1 at 27. Dr. Lee acknowledged that a gait problem could affect an individual's back, but observed that he had not found any clinical back problem upon examination of the Claimant. EX 1 at 30. Dr. Lee concluded that his balance was impaired, but noted that the primary factor in his gait impairment was the discrepancy between the lengths of his legs. However, the impairment rating that Dr. Lee calculated was based entirely upon the gait impairment related to the injury. EX 34-35. Dr. Lee stated: "[Claimant] does have, in my opinion, more than the 7 percent originally I calculated impairment of the gait…my job was specific. U.S. Department of Labor asked me to do an impairment related with that 1994 injury. So I did not calculate his pre-existing leg length discrepancy." EX 1 at 35.

Dr. Lee concluded that Claimant's knee problem would be unlikely to improve, and that he might need joint replacement eventually. EX 1 at 33. Dr. Lee also concluded that Claimant's heel would remain partially un-healed, explaining that the heel was in a state of pseudo arthrosis with a fibrosis union, which prevents any movement in the subtalar joint. EX 1 at 36. Dr. Lee observed that Claimant walked with a limp, and attributed the limp, in part, to the discrepancy in the length of his legs. Id.

Dr. Lee imposed restrictions on activities that Claimant could perform in the course of a work day, including climbing and squatting. EX 1 at 38. In addition, Claimant would be restricted to less than four hours from getting up and down in a confined space. EX 1 at 38-39. He should lift no more than 30 pounds occasionally and 10 pounds frequently. EX 1 at 39. Dr. Lee reiterated that he could not state with any certainty when Claimant reached MMI, and could only say that it was sometime after the second surgery for his right foot. EX 1 at 40. Dr. Lee believed that Claimant's treating doctor was the best source for determining MMI. Id. Dr. Lee had reviewed jobs that a vocational expert had referred to him as being suitable for Claimant. EX 1 at 41-42.

Noubar A. Didizian, M.D. (EX 2; 2a; 2b; 2c; 2d; 2e)

Dr. Didizian is a Board-certified orthopedic surgeon (EX 2a) who examined Claimant for the first time on May 27, 1999 (EX 2b). In a report of that date, the doctor summarized Claimant's injury of March 30, 1994, and his medical treatment thereafter. Dr. Didizian documented Claimant's medical history, including his motor vehicle accidents and diabetes. Claimant's difficulty climbing and squatting was noted, and Claimant reported a "buckling sensation" at the left knee. He had pain in the right heel and pain when walking. His right knee and left ankle caused him no complaints. Claimant experienced occasional stiffness in his left 5th toe, and had pain on the outside part of the joint, with pain laterally and at the bottom. He reported feeling as though he was "walking on a pebble". EX 2a. The doctor's examination showed Claimant's gait to favor his right ankle. He had mild medial instability over the collateral ligament of the left knee, and stable cruciate. He had equal range of motion, with crepitation at the patellofemoral joint on the left side, with no active synovitis in either knee. His left fifth toe showed good alignment, and the doctor saw no claw deformity. The right ankle was "puffier". The doctor observed that Claimant's right leg is slightly shorter than the left., and "because of that he has a slight pelvic obliquity". EX 2b.

Dr. Didizian summarized his review of the Claimant's treating records. The doctor observed, "[b]ased on examination today and review of the records, I found the patient to have a fairly stable left knee with minimal valgus laxity. No pivot shift instability. Excellent range of motion. No effusion. The small toe is also well healed on the left side. The right ankle does show widening, but good valgus heel of 7º. Pain in the sinus tarsi". EX 2b. Dr. Didizian did not believe that Claimant required further medical treatment of his left foot or left knee, but agreed that his right ankle might need future surgery. Id.

Dr. Didizian examined Claimant again on June 24, 2002, and observed that he had been in automobile and motorcycle accidents since he was last examined. EX 2c. The doctor noted that Claimant was not then undergoing any treatment for his work related injury, but had undergone surgery in July, 1999 for a right heel fusion, after which he wore a cast for six months and a boot for a year. Claimant reported getting stiff in his left knee after sitting for 30 minutes, and getting relief upon stretching and walking. He cannot squat or twist. He feels pain upon increase in activity, and has difficulty climbing and descending steps. Claimant feels that his right heel and ankle are stable, but he continues to have some pain at his left 5th toe. He has no left ankle or right knee complaints.

Upon examination, the doctor observed good gait, with heel strike, mid stance and toe off, normal flexion, tilt, rotation and extension. Range of motion of the left knee was 0-120 degrees, after which the Claimant felt sore in the medial collateral ligament on the femur. ROM on the right was 0-130 degrees. The doctor observed slight puffiness at the fracture site of the Claimant's left tibia, but it was well healed, and no pain was evident. Claimant's left ankle showed normal extension, flexion, inversion and eversion with no pain or instability or synovitis. Examination of the Claimant's left 5th toe was normal, but Claimant indicated soreness over the joint. Tendons and ligaments were intact. The right ankle showed a stable fusion with full mobility in extension and flexion, and no effusion, edema or synovitis. The doctor concluded that Claimant's right ankle has fully recovered with no residuals and further concluded that his left 5th toe had fully recovered as well. Claimant's left knee was stable but had crepitation. Dr. Didizian found that Claimant had reached MMI with respect to his work related injury of March 30, 1994, but observed that his left knee had some restriction in full flexion. The doctor imposed a 10% impairment rating of the lower extremity due to the left knee, and 5% of the lower extremity due to his right ankle. EX 2c.

Dr. Didizian examined Claimant again on April 11, 2006, and summarized the results of his examination in his report of April 11, 2006. EX 2d. The doctor observed that since he had last seen Claimant, he had been involved in a motor vehicle accident in which he suffered no apparent physical injury. Claimant was not participating in any treatment related to his 1994 work related injury. Claimant was able to drive and shop for groceries, and could walk for two blocks, but then had pain in his left knee. He also experienced pain in his knee upon prolonged sitting. His knee swells with activity as well, and he cannot pivot on the knee. He feels pain on the medial side of the joint and the patella, which he placed at 3 on a scale of 10, with an increase to 8 when walking more than two blocks. Claimant avoids squatting and kneeling. Claimant reported that he feels as though he is standing on a pebble on his left foot, and has occasional swelling. He has no problems with his left ankle. He has decreased motion from side to side on his right foot and ankle, but has good extension and flexion.

Dr. Didizian observed that Claimant favored his left leg and kept his left knee stiff when walking. He could stand on his toes and heels while holding onto the exam table, and flexed his back without difficulty. He had no loss of motor, sensory or reflex systems in his lower extremities. Claimant kept his left leg straight when asked to squat. His left knee showed minimal synovitis and medial joint line pain, and tests were negative for meniscus pathology, but soreness was felt with tests. Claimant's range of motion was reduced on the left knee as compared to the right. No pain was evident at the right ankle, and flexion and extension equaled the left ankle. On the right side, there was no inversion or eversion from the fusion, but on the left, eversion was 25º and inversion was 20º. Claimant's left 5th toe was stable, and "piggybacked" towards the 4th toe at the 2-th level when standing. Claimant had difficulty flexing the toe actively, but passively, it could be repositioned. The joints were intact. The doctor concluded from his examination the Claimant had residuals in the left knee and minimal residuals in the left 5th toe and pain free ankyloses of the subtalar joint of the right ankle. The doctor calculated impairment ratings using the AMA Guidelines for Permanent Impairment. He calculated a 7% gait abnormality impairment; a 4% impairment due to the left knee ; a 1% impairment for the left 5th toe; and a 4% impairment of the right ankle. The doctor calculated a 16% impairment of the whole body. EX 2d.

On May 4, 2006, Dr. Didizian addended his report of April 11, 2006, to address his impairment rating. EX 2e The doctor reiterated his calculation of 7% impairment due to gait derangement. He amended his left knee lower extremity impairment rating to 10% and his left 5th toe mobility impairment to 2%of the lower extremity impairment. The doctor wrote that "as far as the subtalar fusion of the right ankle is concerned, it corresponds to 10% of the lower extremity impairment".. Dr. Didizian explained, "excluding the gait abnormality, which I indicated could not be calculated for the lower extremity rather the whole person, the rest of the issue as far as the right ankle, left knee, and left small toe corresponds to 22% of the lower extremity impairment." EX 2e. The doctor approved a list of physical requirements required by several jobs provided by vocational expert Jose Castro. EX 2e.

Dr. Didizian testified by deposition on September 5, 2006, and stated that approximately 10% of his medical practice involves performing independent medical evaluations for parties involved in litigation. EX 2 at 6. The doctor testified that he had examined Claimant three times over the period beginning in May, 1999 through April, 1996. Id. at 8-44. The doctor reviewed the results of his examinations, as documented in his reports. Id. Dr. Didizian addressed the impairment rating that he had reported in his report of May 4, 2006. EX 2 at 45. The doctor explained that he could only refer to the gait impairment as a whole person impairment, and could not calculate that impairment for the lower extremity only. The doctor reiterated that the left knee impairment would be a 10% impairment, and the left fifth toe would be a 2% lower extremity impairment, and the right ankle fusion corresponded to a 10% lower extremity impairment. Id. Dr. Didizian agreed that Dr. Lee's calculation of the gait impairment was an acceptable calculation. EX 2 at 46. Dr. Didizian also addressed Dr. Maslow's opinions and maintained his view that his impairment ratings were properly based upon his examination of the Claimant. EX 2 at 48.

The doctor testified that he believed Claimant could return to full time work, but could not return to work as a forklift operator. EX 2 at 46-47. He believed that he could perform the

work described by vocational expert Castro, with the restrictions indicated on the forms that he had approved. EX 2 at 47. Dr. Didizian testified that he believed that Claimant's restrictions would not prevent him from getting in and out of a car, from going up parking ramps, and from going up and down steps, so long as he didn't have to mount and descend many flights of stairs. EX 2 at 63.

Dr. Didizian testified that Claimant's activity level did not change significantly from his examination in1999 to his examination in June, 2002. EX 2 at 54. The doctor found that although Claimant believed he could not squat, it appeared that he preferred keeping his left straight and did not want to bend it. EX 2 at 55. However, the doctor concluded that he could not perform work that involved squatting with the left knee. Id. The doctor's examination was not consistent with Claimant's reports of pain with twisting, but he noted that Claimant reported symptoms with daily activities. Ex. 2 at 56. Dr. Didizian found no significant difference in Claimant's symptoms and examination between those observed in 2002 and those observed in April, 2006. EX 2 at 58. The doctor believed that Claimant's reports of pain upon prolonged walking would be consistent with the clinical findings. EX 2 at 58-59.

E. Vocational Evidence

Jose R. Castro (EX 3; EX 3a; EX 4)

Mr. Castro conducted a vocational interview of Claimant on March 14, 2003, and prepared a report of his wage earning capacity dated April 22, 2003. EX 4. Mr. Castro reviewed reports by Dr. Didizian of May 27, 1999 and of June 24, 2002, as well as medical records and vocational information pertaining to Claimant's work. Although Mr. Castro acknowledged his awareness of Claimant's motor vehicle accidents, he confined his evaluation to Claimant's limitations related to his injuries from the accident of March 30, 1994, and the restrictions provided by Dr. Didizian in his report of June 24, 2002.

Mr. Castro documented that the work related injury involved Claimant's left knee, left fifth toe and right ankle. He relied upon the following restrictions provided by Dr. Didizian:

I. In an 8-hour day the claimant can: sit 6 hours, stand 2 hours, walk 2 hours.

II. The claimant can lift 10 pounds frequently, 11 to 20 pounds occasionally, 21 to 51 and 51 to 100 pounds rarely.

III. The claimant is able to: bend-frequently, squat rarely, crawl-rarely, climb-occasionally, kneel-rarely. EX 4 at page 3.

Claimant reported having problems with his left knee and left fifth toe, and said that he believed his condition had stabilized. He does not receive ongoing medical treatment for the injury, but takes insulin for diabetes. He is a high school graduate, and attended St. Joseph's College for a special course of study to become a business agent for the union. He has little experience with computers and does not consider his reading and writing skills to be good. He

has a lot of mechanical background and believes he has good aptitude in that area. He functioned primarily as a driver, but most of his work was physical in nature.

Mr. Castro concluded that based upon Claimant's apparent ability to attend college level courses and finish high school, he could perform work that involved some reading and writing skills. He concluded he could work as a telemarketer, a security guard/desk attendant/customer service, collections/service contract telephone sales person; parking attendant, cashier; cashier dispatcher. Mr. Castro observed that Claimant has good verbal skills in addition to his work and educational skills.

In a report dated July 29, 2006, Mr. Castro considered reports of Dr. Didizian, Dr. Maslow, Dr. Lee, and Dr. Lukas, and updated his report on Claimant's earning capacity. EX 4. Mr. Castro noted Dr. Didizian's physical and postural restrictions and impairment rating, and noted Dr. Lee's impairment rating of 27% and Dr. Maslow's impairment rating of 53%, and assessment that Claimant's most serious injury was most likely the left knee. Mr. Castro also summarized Dr. Lukas' evaluation and his test results, and summarized his own report of April 22, 2003. Mr. Castro offered the opinion that Claimant "continues to be able to perform sedentary or light duty exertional level" work. EX 4. Mr. Castro disagreed with Dr. Lukas's opinion that Claimant could not compete in employment, and found it unusual that Dr. Lukas concluded that Claimant's intellectual functioning was at the low to average range when he was able to complete two years of Business Agent studies at St. Joseph's University. Even accepting Dr. Lukas' test findings however, Mr. Castro observed that there were other jobs that Claimant could perform that did not require transferable skills, such as booth cashier and gate guard. EX 4.

In a report dated August 1, 2006, Mr. Castro documented three cashier jobs that he concluded were within Claimant's limitations. EX 4. These jobs were approved by Dr. Didizian. Id.

Mr. Castro testified by deposition on November 16, 2006, and described his educational and professional experience. EX 3 at 6-7. Mr. Castro's C.V. was provided at the time of his testimony, and reflects that he is self-employed as a vocational consultant who provides vocational assessments, vocational counseling, job placement, job analyses and expert vocational testimony. EX 3a. Mr. Castro is a licensed rehabilitation counselor in the State of New Jersey and a disability analyst with the American Board of Disability Analysts. EX 3 at 6. Mr. Castro summarized his meeting with Claimant, and stated that he understood his educational background to include high school graduation and the completion of a course at St. Joseph's University to become a business agent. EX 3 at 9. He did not receive a degree from that course, but he passed the course. Id, at 9-10. Mr. Castro testified that Claimant told him that his reading and writing skills were not good and that he had little skills on the computer. Id. at 9.

Mr. Castro reviewed Claimant's job history and educational background and made an analysis of his transferable skills, concluding that he had very few true skills that would transfer to sedentary and light duty positions, to which he was restricted by physical limitations. EX 3 at 10-11. Mr. Castro noted, however, that because Claimant was able to complete courses held in a college setting that involved some academic skills, he would have the skills necessary to learn

sedentary or light duty work on the job, and would be able to compete for an entry level position. Id. at 11. Mr. Castro conducted a limited labor market survey that sampled light duty jobs, including telemarketing, desk attendant, customer service, and cashier positions, which were actually available, and which were approved by Dr. Didizian. Id. at 11-12.

Mr. Castro also reviewed additional medical information and the vocational evaluation conducted by Dr. Lukas. Mr. Castro observed that Dr. Didizian's restrictions had not much changed from those he had imposed earlier. Mr. Castro reviewed the testing administered by Dr. Lukas and his opinion that Claimant did not have transferable skills or ability to meet the demands of competitive employment. EX 16-17. Although Mr. Castro did not disagree with Dr. Lukas' testing, and agreed that Claimant did not have true transferable skills, he did not accept the conclusion that an individual need actual transferable skills to be employable, and observed that Claimant would have the necessary skills to benefit from on-the-job training. Id. at 17. Although Mr. Castro noted that Claimant's test results were somewhat incongruent with his high school diploma and subsequent studies for business agent training, he observed that he had not had any academic work for many years and stated that "skills do erode". EX 3 at 18.

In consideration of Dr. Lukas' testing, Mr. Castro removed the telemarketing and customer service work from his survey, but continued to believe that Claimant could perform work as a gate guard and cashier after on the job training. EX 3 at 19. He believed that Claimant could earn somewhere in the $7.00 to $8.00 per hour range, or from $280.00 to $320.00 per week. At the time of his testimony, the jobs were still available. EX 3 at 20. Mr. Castro had personally visited each job site, and testified that the descriptions he provided accurately reflected the job duties. EX 3 at 22. The jobs at Sun Parking are not valet parking jobs, but involve manning a cashier booth, and collecting parking fares. Id. One may sit and stand at will. EX 3 at 23. No driving is involved, nor is climbing, squatting, or crawling. Id. The only walking involved is when the individual walks from the main office to the booth and back. EX 3 at 24. The job at Parkway is a cashier/valet, which involves both cashier and valet. EX 3 at 24. The amount of time driving as valet depends on the location and size of the parking lot. Id. Both Drs. Lee and Didizian approved all of those jobs. Id. at 25. Mr. Castro acknowledged that cashier jobs don't pay much and don't offer much upward mobility. EX 3 at 28. He talked about desk security jobs which pay a little more, and stated that Claimant would be restricted to monitoring security, rather than enforcing security. However, he did not clarify whether the jobs he identified required a guard to use physical force in any manner. EX 3 at 30-32.

Mark Lukas, Ed. D. (CX 2)

Dr. Lukas testified by deposition on November 22, 2006. Dr. Lukas stated that he is a vocational rehabilitation consultant whose private practice consists of the performance of vocational evaluations and occupational testing. He also conducts training programs and counseling. He has a baccalaureate degree in sociology and social welfare from Bloomsburg University and a master of science degree in rehabilitation counseling from the University of Scranton. His doctorate in education is from Wilmington College.[2] CX 2 at 4. Dr. Lukas is a

[2] Although Dr. Lukas's C.V. was referred to during his deposition, and it is suggested that it was attached to his testimony, it is not in evidence.

member of the American Board of Vocational Experts, and has held academic positions teaching in the field of disability and vocational services. CX 2 at 4-5.

Dr. Lukas evaluated Claimant on May 17, 2006, and reviewed his work, social, educational and health background with him. CX 2 at 7. Claimant underwent a battery of vocational tests that assessed Claimant's academic capacity, basic intelligence, skills and abilities. Id. Dr. Lukas also reviewed Mr. Castro's reports. Id. Dr. Lukas concluded from his interview with Claimant that before his work injury in 1994, he was not physically limited from performing the duties of heavy labor. CX 2 at 8-9. The doctor testified that Claimant described having "significant academic struggles related to the academic course work in high school." CX 2 at 9-10.

The doctor was aware of Claimant's work related injury of March 30, 1994 that involved his left lower leg and knee, and his subsequent injury to his right foot in 1998. He also described his motor vehicle accidents with trauma to his shoulders and a 2001 motorcycle accident that involved trauma to his lower extremities. CX 2 at 11. The doctor observed that the Claimant was wearing a brace on his leg and sat with it extended, and also walked with a limp. Claimant described having problems walking on uneven terrain, navigating stairs, and having a leg length discrepancy. Id. He had pain in his left knee and had limited ability to lift. CX 2 at 12.

The Claimant placed in the lower end of the average range of tests that measured verbal and general intellect, and he placed in the third grade level in reading and math ability on an achievement test. His abilities in visual recognition and phonetics were marginal and he placed below average in a visual clerical speed test. CX 2 at 12-13. Based on the test findings and Claimant's work history, the doctor found he had no transferable skills into lighter forms of work, concluding that he didn't have clerical ability. The doctor concluded that Claimant didn't have "any reasonable opportunity…for participation in the job market". CX 2 at 14. The doctor acknowledged that Claimant could do some sedentary or lighter kind of work, but disagreed that he could perform the work of a cashier, customer service or parking valet. Dr. Lukas noted that Claimant had not ever worked in customer service or a job with interface with the public and did not think he had the math skills to reconcile receipts. CX 2 at 16.

Dr. Lukas agreed that Claimant had the ability to maintain a commercial driver's license, which required some ability to read and write. CX 2 at 19-20. The doctor did not ask Claimant if he was able to use a computer. Id. He believed Claimant would struggle with math and reconciling receipts even with on the job training. CX 2 at 21.

F. Other Evidence

EX 5 LS 206 dated April 8, 2004

EX 6 LS 208 dated December 10, 1996

EX 7 LS 207 dated December 10, 1996

EX 8 LS 206 dated April 18, 1997

EX 9 LS 206 dated July 20, 1999

EX 10 LS 208 dated July 20, 1999

EX 11 LS 208 dated September 3, 2002

EX 12 LS 207 dated September 3, 2002

2. **Discussion**

A. The relationship of Claimant's condition to his employment

Coverage under the Act is presumed in accordance with § 20(a) in the absence of substantial evidence to the contrary. Claimant bears the burden of establishing entitlement to the §20(a) presumption by establishing a prima facie case. To establish the presumption, Claimant need only show that he (1) suffered an injury, harm, or pain and (2) working conditions existed that could have caused the harm. U.S. Industries/Federal See, Metal v. Director, OWCP, 455 U.S. 608 (1982). In establishing these elements, the presumption of a causal connection between the harm and employment applies. In addition, where an individual's employment related injury combines with or aggravates a pre-existing condition, the entire result is compensable if disability results. Strachan Shipping Co. v. Nash, 782 F.2d 513 (5th Cir. 1986).

The parties are in agreement that Claimant suffered an injury related to his employment, and is disabled under the Act. This issue is not in dispute, and what I must determine is the extent of Claimant's disability.

B. Nature and Extent of Claimant's Disability

Under Section 3(a) of the Act, injured maritime employees are compensated for disability due to a work related injury. 33 U.S.C. § 903(a). For purposes of the Act, disability is an economic concept, except for those injuries that are compensated pursuant to the schedule set forth at Section 8(c)(2), 33 U.S.C. § 908(c)(2). In circumstances where an individual has achieved maximum medical improvement, any permanent partial disability award must be made under Section 8(c)(2) where the record contains evidence of medical impairment sufficient to support an award. Potomac Electric Power Co. v. Director, OWCP, (PEPCO), 449 U.S. 268, 14 BRBS 363 (1980). Under the schedule, a claimant is entitled to benefits for a limited number of weeks, and not to a continuing award. Gilchrist v. Newport News Shipbuilding & Dry Dock Co., 135 F. 3d 915 (4th Cir. 1998).

Claimant asserts that he is totally disabled under the Act, notwithstanding the nature of his injuries, which might otherwise fall within the construct of Section 8(c)(2). Employer asserts that Claimant is partially disabled, and argues that his disability is comprised of scheduled losses, contending that Claimant retains the ability to perform suitable alternative employment.

I find it appropriate to determine the extent of Claimant's disability in order to resolve the threshold issue of how compensation, to which Claimant is undisputedly entitled, would be calculated.

C. Discussion of the Vocational Evidence

Dr. Lukas conducted a number of tests with results placing Claimant in the low to average range of verbal and general intellectual functioning. He found Claimant's visual recognition and phonetic ability "marginal" and found that he had no transferable skills to lighter forms of work or clerical work. Mr. Castro noted that Claimant had been able to complete a course in labor relations that was sponsored by a university, and had completed high school. Claimant also continued to maintain a commercial driver's license, and Mr. Castro acknowledged that Claimant's academic skills had probably eroded from disuse, and had no transferable skills. Nevertheless, Mr. Castro concluded that Claimant's educational and occupational history were sufficient to allow him to secure a position in entry-level work, albeit at in very low level positions with minimal pay.

In his updated earning capacity report of July 29, 2006, Mr. Castro took into consideration Dr. Lukas' testing, and updated medical reports and opinions. EX 4. Mr. Castro revised his original labor market survey that concluded that Claimant could perform positions such as telemarketer, security desk guard, customer service, and cashier. Mr. Castro excluded the jobs of telemarketer and customer service, but continued to believe that Claimant could perform the work of Gate Guard and Booth Cashier.

Three cashier jobs were identified and approved by Drs. Lee and Didizian. One was identified as an attendant cashier/valet for Parkway corporation, and was described as involving working the register, handling money, making change, reconciling receipts at the end of the shift, driving cars around parking lot when lot is full. EX 4. Mr. Castro acknowledged that depending on the location at Parkway, an individual may spend more time moving cars than manning a booth, but said that the location would be known to the individual in advance. Cashier for Sunpark was described as a job performed inside, working on the register in a booth at a parking lot, letting people in and out of the lot and handling receipts. EX 4. The Security Guard Desk Attendant position that was available required an individual to monitor individuals as they entered an apartment building. All of the jobs were generally sedentary in nature.

I find that the preponderance of the credible evidence supports finding that Claimant could perform suitable alternative employment. I agree that the work that Claimant could perform considering his impairments is not on par with his work as a driver or a longshoreman, neither in physical demands, nor in economic reward. Nevertheless, I find that Employer has met its burden of establishing that Claimant retains the capacity to return to the work place as a cashier or cashier/valet. I do not find Claimant's intellectual deficiencies so severe as to prevent him from being trained to take in cash and account for parking receipts. Claimant lives with his son, is responsible for shopping, maintains a home and vehicle, and in addition owns, operates and repairs a motorcycle. He continues to drive his car and bike. He holds a commercial driver's license, which infers some ability to read technical information. He applied for and received benefits from the social security administration. It is axiomatic that he has the mental

acumen to handle his household budget and all of his and his son's living expenses. I find that Claimant could perform the duties of a cashier or valet. I further find that Claimant cannot perform the work of a security guard. He is restricted from prolonged sitting, and the job description was too vague to conclude that it would allow him to sit and stand at will. In addition, although it is anticipated that he would "call the authorities" in the case of an emergency, Claimant's limitations would prevent him from any physical interception of individuals unlawfully entering a property.

I can appreciate that Claimant would not find the work of a cashier or valet compatible with his interests. However, it is apparent that Claimant is not inclined to do the work, but would be able to do it. I do not find the job of a valet or cashier to require the same reading or interpersonal skills as representing union membership at grievance disputes. Claimant voluntarily left the business agent job because he felt incompetent, but that job required more than tallying receipts and greeting customers. I understand that Claimant would prefer not to work as a cashier or valet. However, that is not tantamount to finding that Claimant would be unable to perform the duties of those positions. Neither requires intellectual skills beyond basic accounting for money. Although one must deal with customers, the interactions are presumably brief, and do not require superior communication skills. Claimant's demeanor at the hearing was polite, and he was intelligible and articulate. I find that he could do the jobs of cashier and valet as identified by Mr. Castro.

Accordingly, I find that Claimant is not totally and permanently disabled due to his work related injury. In the absence of a showing of total disability, Claimant shall be compensated under the appropriate schedules pursuant to Section 8(c)(2).

D. Discussion of the Medical Evidence

(1) Maximum Medical Improvement

Dr. Gleimer concluded in July, 1996, that Claimant could perform sedentary and some light duty work. CX 14. Dr. Gleimer's opinion is of little value to my inquiry, because it was rendered before Claimant suffered the injury to his heel in 1998 that subsequently required surgery and prolonged recovery. Dr. Gleimer concluded that Claimant could perform sedentary activities and some light duty. However, I note that even before that development, Dr. Gleimer concluded that Claimant would "have difficulty potentially with prolonged maintenance of flexed knee position as well as prolonged standing and/or walking and these would reasonably result in discomfort to this knee due to either the stress of activity and/or the general ache and stiffness which will occur following prolong immobilization/immobility (i.e. sitting). As a result, it is my opinion the patient is not totally disabled, but cannot return to heavy work, construction or as a longshoreman." CX 14.

The other physicians of record had difficulty determining the date of Claimant's maximum medical improvement with any certainty. Dr. Lee opined that he would accept the opinion of Claimant's treating physician on this issue, but the record is devoid of such an opinion. Claimant's surgeon, Dr. Kelly, continued to treat him after his February, 2000 surgery to remove the surgical screw from his fusion to repair his right heel. He thereafter underwent

treatment by an infectious disease specialist, Dr. Peterson, who in December predicted a course of at least six weeks of treatment with intravenous antibiotics. In April, 2000, Claimant was hospitalized with an ongoing problem with his right leg.

Dr. Maslow first examined Claimant in October, 2005, and provided an impairment rating, which presumes that Claimant had reached maximum medical improvement. Dr. Lee declined to state with certainly when Claimant reached MMI, and would say only that it was sometime after he had reached full recovery from his second surgery on his right foot. Dr. Didizian conducted examinations of Claimant at intervals throughout his treatment, and saw him first in May, 1999, before he underwent surgery to repair his right heel injury. Dr. Didizian examined Claimant next on June 24, 2002, and noted that he was not undergoing any treatment. The doctor concluded that Claimant had reached maximum medical improvement at least by the date of his examination on June 24, 2002. I find this to be the best evidence of record to support the date of Claimant's maximum medical improvement, and I accord it substantial weight.

(2) Scheduled Loss and Rate of Impairment

Where there is an injury to separate scheduled body parts, the respective disabilities must be compensated under the schedule, in the absence of a showing of a total disability, with the awards running consecutively. PEPCO, supra. Since Claimant suffered injuries to more than one member covered by the schedule, he must be compensated under the schedule. See, Brandt v. Avondale Shipyards, 16 BRBS 120 (1984). Where the injury occurs to a larger member and impairs smaller connected members, then the award of permanent partial disability benefits should be based on the loss of use of the large member, particularly where the disability results from one accident. Mason v. Baltimore Stevedoring Co., 22 BRBS 413, 416-417 (1989). All of the physicians who rated the Claimant's impairment provided a disability rating based upon the loss of the use of his lower left and right extremities, citing knee impairments, gait abnormality, loss of motion, and pain.

Dr. Maslow provided different impairment ratings, at different times, based upon different considerations. In a letter dated February 17, 2006, the doctor calculated the following rating:

1) A 3% left lower extremity impairment as a result of the metatarsal phalangeal joint injury.
2) a 75% impairment of the left lower extremity as the result of the knee impairment with gait abnormality, atrophy, loss of motion, ligamentous injury, and instability and documented arthritis factored in.
3) A 38% lower extremity impairment based on the calcaneal fracture on the right side with the required arthrodesis and resultant gait abnormality. CX 1c.

This rating was different from the rating Dr. Maslow calculated in November, 2005. CX 1 at 21. At that time, he found 1% at the left foot, 15% at the right foot, and 45% at the left knee. Id. Upon reviewing Dr. Didizian's reports, Dr. Maslow concluded that he had underestimated his disability rating, because he had not fully considered the Claimant's restricted range of motion. CX 1 at 21-23.

Dr. Didizian also calculated different impairment ratings using the AMA Guidelines for Permanent Impairment. He had calculated a 7% gait abnormality impairment; a 4% impairment due to the left knee; a 1% impairment for the left 5th toe; and a 4% impairment of the right ankle. He amended his left knee lower extremity impairment rating to 10% and his left 5th toe mobility impairment to 2% of the lower extremity impairment. The doctor corresponded the fusion of the right ankle to 10% impairment of the lower extremity, "excluding the gait abnormality, which I indicated could not be calculated for the lower extremity rather the whole person, the rest of the issue as far as the right ankle, left knee, and left small toe corresponds to 22% of the lower extremity impairment."

Dr. Lee rated Claimant with an impairment of the left leg of 13.5%, and of the right leg of 13.5%, for a total of 27% impairment of the lower extremities. Dr. Lee did not find any impairment of the Claimant's left 5th toe.

I accord less weight to Dr. Didizian's ratings because he maintained that he could not calculate a gait abnormality except as for the whole person, which is not recognized by the Act. I find that Dr. Didizian's impairment ratings are not fully well explained, as he accepted Dr. Lee's calculation of the gait impairment, but did not recalculate his rating accordingly. EX 2 at 46. Dr. Didizian's impairment rating also does not appear to give full consideration to Claimant's subjective complaints, which are consistently reported throughout the record. Dr. Didizian suggested that Claimant "favored his left leg and held his left knee stiff" as though it were a matter of choice, and yet the doctor did observe that Claimant's range of motion on the left knee was reduced.

Dr. Maslow's opinion appears to be inconsistent with the record of Claimant's reported activities, particularly the fact that Claimant continued to drive both his motor vehicle and motorcycle despite his impairments, and was able to independently maintain activities of living, such as caring for his home and his son. In addition, Dr. Maslow's explanation for altering his impairment rating based upon Dr. Didizian's findings was not well explained, considering that Dr. Didizian's rating was lower than those of either Dr. Maslow or Lee.

Considering the evidence as a whole, I find that Dr. Lee's impairment rating is the best supported of record. I find little evidence to support Dr. Maslow's contention that Dr. Lee did not consider Claimant's heel injury, and I find that the doctor specifically included residuals from that injury in his impairment rating. I note that Employer's argument appears to urge me to rely upon Dr. Lee's rating, rather than Dr. Didizian's. See, Employer's brief at page 22. I find that Dr. Lee's reasoning is the best supported by the preponderance of record. I accord additional weight to his opinion due to his status as an independent and impartial medical examiner. However, I find that Dr. Lee's opinion should be modified to include a 2% impairment due to the derangement of Claimant's left 5th toe, which is the rating that both Drs. Didizian and Maslow included in their assessments. The record establishes that Claimant continues to experience subjective symptoms and objective effects. I find it appropriate to increase Dr. Lee's assessment of Claimant's left leg impairment by 2% to 15.5%.

Accordingly, I find that pursuant to Section 8(c)(2), the Act provides for 288 weeks of compensation for the loss of a leg. Therefore, Claimant is entitled to a scheduled loss at the rate of 13.5% X 288 or (38.88 weeks) + 15.5% X 288 or (44.64 weeks) for a total of 83.52 weeks.

E. Payment of Medical Bills Under Section 7(a)

Claimant has asserted in his brief that medical bills are outstanding. In correspondence submitted March 8, 2007, Employer objected to paying bills that had not been presented for payment. In correspondence submitted March 12, 2007, Claimant advised that the parties had agreed to pay all bills related to the claim herein, and that Employer's objection would be withdrawn. Accordingly, I find that this is not an issue.

In any event, other than the untimely submission of a list of bills attached to Claimant's brief, no evidence was submitted that suggests any co-payments or deductibles remained outstanding to Claimant. Accordingly, I find that Employer has satisfied its obligation under § 7(a) of the Act.

3. **Conclusion**

Claimant is permanently partially disabled and entitled to scheduled loss at the rate established by the schedule set forth at Section 8(c)(2).

ORDER

1. Employer is hereby ordered to pay to Claimant compensation at the rate of $488.52 per week for a period 83.52 weeks.

2. Payment should be calculated as commencing the first date after the date that Claimant reached maximum medical improvement on June 24, 2002.

3. Employer shall receive credit for any compensation already paid, which the parties agreed commenced on 6/24/02, and was paid for 43.20 weeks at $488.52 per week for a total of $21,104.06.

3. Employer shall pay interest at the rate specified in 28 U.S.C. § 1961, computed on all accrued benefits from the date such payment was originally due to be paid.

4. Claimant's attorney, within 20 days of receipt of this Order, shall submit a fully documented fee application, a copy of which shall be sent to opposing counsel, who shall then have ten (10) days to respond with objections thereto.

A

Janice K. Bullard
Administrative Law Judge

Cherry Hill, New Jersey